Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of SBC for Forbearance From the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Sections 53.203(a)(2) and 52.203(a)(3) of the Commission's Rules and Modification of Operating, Installation and Maintenance Conditions Contained In the SBC/Ameritech Merger Order	)	CC Docket Nos. 96-149, 98-141

COMMENTS OF AT&T CORP.

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Pursuant to the Commission's Notice,[1] AT&T Corp. ("AT&T") hereby submits its opposition to SBC's Petition for Forbearance and Modification. SBC seeks forbearance from the "crucial[ly] importan[t]"[2] provisions of section 272 that prohibit SBC from having incumbent local exchange carrier ("LEC") subsidiaries perform "operating, installation and maintenance" ("OI&M") services on behalf of its long distance subsidiary ("SBCLD"). In addition, SBC seeks a waiver of the SBC/Ameritech merger conditions that regulate OI&M services between SBC's incumbent LEC subsidiaries and SBC's "separate" advanced services affiliate ("ASI"). Neither request should be granted.

INTRODUCTION AND SUMMARY

In the *Non-Accounting Safeguards Order*, the Commission concluded "that allowing the same personnel to perform the operating, installation, and maintenance services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the opportunity for such substantial integration of operating functions as to preclude independent operation, in violation of section 272(b)(1)."[3] In creating this prohibition, the Commission explicitly relied on a principle established when the BOCs were first created – that allowing a BOC to provide network-related services on behalf of an affiliate "would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors," and "would create substantial opportunities for improper cost allocation."[4] Thus, the Commission concluded that the OI&M prohibition was vital to fulfilling

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[1] DA 03-1920 (June 10, 2003).

[2] *Texas 271 Order*, 15 FCC Rcd. 18354, ¶ 395 (2000).

[3] *Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 163 (1996).

[4] *Id.* (citing *BOC Separations Order*, 95 F.C.C.2d 1117 (1983)) (emphasis added).

section 272's central purpose of "prohibit[ing] anticompetitive discrimination and cost-shifting."[5]

Despite the Commission's repeated recognition of the need for and benefit of OI&M "separation," the BOCs sought reconsideration of the Commission's imposition of the OI&M safeguards in the *Non-Accounting Safeguards Order*, claiming that the Commission's interpretation of section 272 was not mandated by the statutory language, and that it was unnecessary to protect against improper cost allocation or discrimination. The Commission again rejected these claims, reasserting its determination that section 272 precludes shared OI&M services, and recognizing that any other ruling would "create a loophole around the separate affiliate requirement" and would provide for such "substantial integration of these essential functions . . . that independent operation would be precluded."[6]

Developments since the *Non-Accounting Safeguards Order* have only confirmed the need for and utility of strong OI&M rules. In the SBC/Ameritech merger proceeding, the Commission found that the combination of SBC and Ameritech *heightened* the combined entity's "incentive to discriminate" against independent long distance carriers and that this incentive is "particularly acute with regards to advanced or customized access services for which detection of discrimination is most difficult."[7] Moreover, the Commission in that merger proceeding rejected the claim that regulators have developed proper tools to detect and prevent discrimination by the "new" SBC and its BOC subsidiaries: "With the increased network complexity, and the possibility for new types of discrimination, comes also an increased difficulty in detecting

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[5] *Id.* ¶ 9.

[6] *Non-Accounting Safeguards Third Order On Reconsideration*, 14 FCC Rcd. 16299, ¶ 20 (1999).

[7] *SBC/Ameritech Merger Order* ¶ 196; *see also id.* ¶¶ 212-35.

discrimination. In such a situation, past experience with the interconnection of plain vanilla, or POTS service, becomes increasingly less useful as a regulatory tool for preventing, detecting, and remedying discrimination."[8] Thus, to mitigate these anticompetitive effects of the merger, the Commission again turned to structural separation. As a condition to consummating its acquisition of Ameritech, SBC was required both to provide advanced services through a separate affiliate "patterned" on section 272 and to provide OI&M services to that affiliate on an arm's-length basis and on non-discriminatory terms and conditions.

SBC's forbearance petition contains no evidence of changed circumstances that could justify repealing the OI&M services restriction required by section 272 or the *SBC/Ameritech Merger Order*. Of course, as a legal matter, that claim is barred section 10(d) of the Communications Act, which explicitly precludes the Commission from forbearing from the requirements of section 271. Section 271(d)(3)(B) expressly provides that the Commission may grant a BOC long distance authority only if the requested authorization "will be carried out in accordance with the requirements of section 272."[9] SBC's Petition would require the Commission to forbear from applying section 271(d)(3)(B), which it is forbidden to do by section 10(d).

In all events, long distance carriers and advanced services providers remain dependent upon SBC and the other BOCs for last mile facilities necessary to access their customers. SBC and the other BOCs therefore retain substantial local market power and the ability and incentive to leverage this market power to undermine competition in the long distance and advanced services market. Hence, section 272's "operate independently" rules in general, and the OI&M

[8] *Id.* ¶ 220.

[9] 47 U.S.C. § 271(d)(3)(B).

rules in particular, remain necessary to prevent SBC from using its control of bottleneck facilities to raise rivals' costs and prevent long distance and advanced services competition on the merits.

If there were any error in the Commission's original balancing of costs and benefits in this area, it is that is that the Commission *underestimated* the competitive harm arising from shared BOC/272 services, and allowed *too much* sharing of other services. Although the Commission prohibited the sharing of OI&M services, it did not restrict the sharing of many other services necessary to operate SBC's long distance affiliate. As a result, in many areas SBC has the unique advantage of being able to provide service on an "integrated" basis. And according to state commission "performance measures," SBC has used that unique advantage to provide competitive carriers with patently inferior access to essential facilities relative to what it provides itself. At the same time, SBC, notwithstanding OI&M requirements that SBC claims prevent it from competing effectively, has achieved "near 50 percent" penetration of the consumer long distance market in its Southwestern territories.[10] On this record, there can be no serious claim that the joint OI&M prohibition is an unwarranted restriction.

SBC's additional request for a waiver of the *SBC/Ameritech Merger Order*'s OI&M-related conditions is even weaker. Because it was clear that the SBC/Ameritech merger would have otherwise substantially increased the combined entity's incentive and ability to harm competition, particularly for nascent advanced services, SBC and Ameritech proposed the creation of a "separate" advanced services affiliate, ASI, that was modeled on the section 272 long distance separate affiliate. With respect to OI&M, however, the merger conditions expressly permitted the "sharing" of OI&M services between SBC's incumbent operations and

[10] *See* Statement of Edward Whitacre, CEO, SBC Communications, Transcript, April 24, 2003 Conference Call Addressing First Quarter 2003 Earnings.

the advanced services affiliate, so long as this sharing is provided on a non-discriminatory basis. Thus, there is simply no way to square SBC's sweeping claims about the costs of the *SBC/Ameritech Merger Order* OI&M conditions with the limited extent to which these conditions restrict the "integration" of SBC's OI&M operations.

Critically, SBC can at any time collapse ASI and fully integrate its advanced services operations with its incumbent telephone operations. The *SBC/Ameritech Merger Order*'s separate advanced services affiliate condition was a temporary one, and subject to "sunset" triggers that have since been met. The obvious question for the Commission then is why does not SBC simply eliminate ASI if the OI&M requirements imposed in the *SBC/Ameritech Merger Order* are so onerous? The answer is buried at the end of SBC's Petition. There, SBC states that the waiver it is seeking should be deemed to have no impact on the Commission's recent holding in the *ASI Forbearance Order* that ASI would be regulated as a non-dominant carrier and excused from tariff filings and related-requirements.[11] But SBC neglects to mention that that this order held that ASI would be excused from dominant carrier regulations only "to the extent" ASI was operated "in accordance with the separate affiliate structure established in [the *SBC/Ameritech Merger Order*],"[12] because these conditions were necessary to prevent the type of market power abuses in which SBC-ASI would otherwise be able to engage absent the tariff filing and related regulations. It is therefore clear that what SBC is really after is the continued benefit of the *ASI Forbearance Order*, but without the protections the Commission relied upon to protect the public interest when it deemed ASI to be non-dominant – protections that are by their terms less onerous than what is required if section 272 were fully applied. The

[11] SBC Pet. at 27.

[12] *ASI Forbearance Order*, 17 FCC Rcd. 27000, ¶ 13 (2002) (emphasis added).

anticompetitive result that SBC seeks is foreclosed by the reasoning of the *ASI Forbearance Order*.

ARGUMENT

I. SBC'S PETITION FAILS TO DEMONSTRATE THE PRECONDITIONS FOR FORBEARANCE FROM THE SECTION 272 OI&M RULES.

For the most part, SBC merely reproduces arguments advanced by Verizon in its August 5, 2002, petition for forbearance from the section 272 OI&M rules. As AT&T explained in its responses to Verizon,[13] the complete answer to SBC's argument is that SBC and the other Bells continue to exercise considerable local market power and can use that power to discriminate against their long distance rivals. Given that the Bells' forbearance petitions would eliminate altogether the OI&M safeguards – and thereby materially weaken the effectiveness of section 272 as a safeguard for preventing the Bells from acting on their incentives to raise rivals' costs – there can be no basis for a finding, as required by section 10 of the Communications Act, that the requested forbearance is consistent with the public interest and the interests of consumers.[14] This is not just the view of AT&T, but the position of every state regulatory commission that has filed comments on this issue.[15]

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[13] *See generally* AT&T's Opposition to Verizon Petition for Forbearance (CC Docket No. 96-149, Sep. 9, 2002); *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC (CC Docket No. 96-149, Nov. 15, 2002).

[14] *See* 47 U.S.C. § 160(a).

[15] *See, e.g.*, Washington UTC 272 Sunset Comments (WC Docket No. 02-112, Aug 5, 2002); Missouri PSC 272 Sunset Comments (WC Docket No. 02-112, Aug. 5, 2002); Pennsylvania PUC 272 Sunset Comments (WC Docket No. 02-112, July 22, 2002). Most notably, the Texas PUC has strongly urged the Commission to extend all the section 272 requirements (which would include the OI&M safeguard):

> The Texas PUC believes that . . . SWBT's continued dominance over local exchange and exchange access services still hinders the development of a fully competitive markets. Thus SWBT retains both the incentive and ability to

(continued . . .)

Rather than attempt to show with hard evidence that it has lost market power, SBC rehashes the same arguments it and the other BOCs presented – and the Commission rejected – in challenging the OI&M rule at multiple stages of the *Non-Accounting Safeguards* proceedings.[16] For example, SBC asserts that other non-structural section 272 requirements make the OI&M restriction unnecessary.[17] The Commission has already responded to each of these contentions, and has provided more than adequate support for its interpretation of section 272(b)(1) as precluding shared OI&M functions. Applying traditional rules of statutory construction,[18] the Commission stressed that shared OI&M services would "inevitably" lead to a level of BOC/affiliate integration that was precluded by the operate independently requirement of section 272(b)(1).[19] For example, such shared services "would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors."[20] The

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(. . . continued)

> discriminate against competitors and to engage in anti-competitive behavior. . . . . Accordingly, prudence demands that the sunset period be extended until the conditions which necessitated the creation of competitive safeguards no longer exist.

Texas PUC 272 Sunset Comments at 3 (WC Docket No. 02-112, July 25, 2002).

[16] *Non-Accounting Safeguards Order* ¶ 163; *Non-Accounting Safeguards Second Order On Reconsideration*, 12 FCC Rcd. 8653, ¶ 12 (1997); *Non-Accounting Safeguards Third Order On Reconsideration* ¶ 20.

[17] SBC Pet. at 15-16.

[18] *See, e.g. Non-Accounting Safeguards Order* ¶ 156 (recognizing that this interpretation of operate-independently requirement "is based on the principle of statutory construction that a statute should be construed so as to give effect to each of its provisions"); *id.* (reasoning that the "structural differences in the organization of [sections 272(b) and 274(b)] suggest that the term 'operate independently' in section 272(b)(1) should not be interpreted to impose the same obligations . . . as section 274(b)").

[19] *Non-Accounting Safeguards Order* ¶ 163.

[20] *Id.*

Commission separately recognized that allowing such shared OI&M services would create "substantial opportunities for improper cost allocation."[21]

SBC dismisses these conclusions, asserting that (despite the Commission's repeated contrary findings) there is nothing unique about OI&M network services that justifies treatment different than other administrative services where the Commission has approve sharing, and that SBC does not and cannot use OI&M service to discriminate against competitors.[22] SBC, however, provides no support for its blanket charge that the Commission was mistaken when it deemed the BOCs' networks, and services directly concerning those networks, fundamentally different than other BOC services. These network facilities are the basis for the BOCs' market power, and are virtually always required inputs for the BOCs' competitors. The Commission has long recognized that network-specific functions are especially susceptible to BOC discrimination with potentially devastating consequences for competitors dependent on these facilities.[23] The Commission likewise long ago recognized the unique opportunities for cost misallocation concerning network services and related expenses.[24] Until SBC's control of bottleneck local facilities dissipates, therefore, the OI&M restriction (like the related bar on joint ownership of network facilities) is a necessary corollary to any requirement that a BOC and its affiliate "operate independently."

Nor are the other requirements of section 272 (such as section 272(e)'s nondiscrimination requirement) or related "performance measures" adequate substitutes for the type of structural

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[21] *Id.*

[22] SBC Pet. at 13-14.

[23] *See, e.g. Non-Accounting Safeguards Order* ¶¶ 158-166.

[24] *See BOC Separations Order* ¶ 70.

separation imposed by the OI&M and other "operate independently" requirements under section 272(b)(1). Enforcement of nonstructural safeguards requires both detection and quick and effective enforcement. Yet the sharing of OI&M that SBC seeks would, as the Commission has concluded since 1983, make detection of misconduct far more difficult. And even if it were discovered, by the time the complaint process had run its course, however, the damage to competitors and competition would be done. SBC in particular has shown a willingness to breach and endlessly litigate enforcement of even the clearest legal obligations, as reflected in the Commission's recent imposition of a record-setting $6 million fine against SBC for having "willfully and repeatedly" violated the "plain" conditions of the SBC/Ameritech merger.[25] Similar repeated violations by SBC led the California Public Utilities Commission, for example, recently to recognize that its "confidence in non-structural safeguards has waned significantly over the last years."[26] This Commission also has elsewhere stressed the need for structural

[25] *SBC Forfeiture* Order, 17 FCC Rcd. 19923, ¶ 1 (2002). As the Commission concluded: "In state after state, throughout the Ameritech region, SBC force competing carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to offer, causing delays in the availability of shared transport." *Id.* ¶ 24.

[26] Decision Granting Pacific Bell Telephone Company's Renewed Motion for an Order that it has Substantially Satisfied the Requirements of the 14-Piont Checklist in § 271 of the Telecommunications Act of 1996 and Denying that it has Satisfied § 703.2 of the Public Utilities Code, *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, CPUC Decision 02-09-050, R. 93-04-003 *et al.* at 265 (Cal. PUC, Sep. 19, 2002). Over just the past thirteen months, the California Public Utilities Commission has imposed fines against SBC of $27 million and $25 million – each records when imposed – for anticompetitive and unlawful conduct in California. *See* Final Opinion on Pacific Bell's Marketing Practices and Strategies, *The Utility Consumers' Action Network v. Pacific Bell* (U 1001 C), Case 98-04-004, D.01-09-058 (Cal. PUC, Sep. 20, 2001) ($25 million fine); Presiding Officer's Decision, *The Utility Consumers' Action Network v. Pacific Bell Telephone Company*, Case 02-01-007, (Cal. PUC, Sep. 27, 2002) ($27 million fine, per settlement).

safeguards, because BOCs can discriminate in myriad subtle forms, and it is "impossible for the Commission to foresee every possible type of discrimination."[27]

Indeed, even for the handful of states in SBC's region that have enacted rigorous "performance measures" with self-executing penalties, SBC nonetheless continues to find it advantageous to provide its competitors with poor network access. For example, according to the January 2003 report from the Texas PUC reviewing the effectiveness of the performance measures enacted in Texas, SBC has met the performance benchmarks set by the Texas PUC in only 6 out of 31 months for which data are now available.[28] As of July 2002, SBC had paid over $25 million in fines, an amount that would have been higher but for the fact that the Texas performance measure penalties cap payments in certain months.[29] And with regard to "special access" performance standards, there are none. The Commission has yet to act despite having sought comments almost two years ago as to the type of measures and penalties it should adopt. On this record, there is plainly no evidence to support SBC's claim that sharing of OI&M services would not permit it to discriminate – it already discriminates with the ban in place, and removal of it would only exacerbate the favoritism it provides to its own operations.

SBC's claim that it does not benefit from such discrimination is laughable. SBC states "in the highly competitive long distance and advanced services marketplaces today, no ILEC affiliate could be assured of being the choice for a disgruntled customer, even if that customer

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[27] *SBC/Ameritech Merger Order* ¶ 206.

[28] Scope of Competition in Telecommunications Markets of Texas, Report to the 78th Texas Legislature, at 50 (Tex. PUC, Jan. 2003) (available at http://www.puc.state.tx.us/telecomm/reports/scope/index.cfm).

[29] *Id.* at 52.

decided not to use the carrier that was the victim of discrimination."[30] SBC might not be "assured" of winning *every* customer of carriers that (because of SBC's actions) are unable to provide service at prices or quality comparable to SBC, but such discrimination clearly tilts the playing field in SBC's favor. Further, to the extent that all carriers depend on access to SBC's facilities, SBC has the potential ability to raise the costs of *all* of its rivals and thereby make it a near certainty that it will gain the lion's share of disaffected customers.

Finally, SBC claims that structural safeguards like the OI&M restriction are unnecessary because it typically operates under price-cap regimes and thus has no incentive to misallocate the costs of its competitive services to regulated accounts.[31] As AT&T has demonstrated, price caps can, in fact, *increase* the incentives for cost misallocation.[32] Under a price cap regime, a BOC has freedom to shift profits from one affiliate "pocket" to another without ever being forced to pass through "excess" profits to regulated customers.[33] Thus, for example, SBC could overcharge its section 272 affiliate for services it also provides to competing long distance carriers (and thereby set an unfairly high rate for competitors under section 272(e)), while separately undercharging the affiliate for services it does not provide to competitors, all without a concern about how such pricing would impact the rates it charged regulated customers.

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[30] SBC Pet. at 15. Nevertheless, SBC and other BOCs have implemented aggressive "win-back" programs, including marketing materials that seek to persuade customers that BOCs have higher service quality than new entrants.

[31] SBC Pet. at 11-12.

[32] Reply Declaration of Lee Selwyn on behalf of AT&T Corp., ¶¶ 35-36 (CC Docket No. 02-112, Aug. 26, 2002) ("Selwyn Reply Dec."); *Ex Parte* Declaration of Lee Selwyn on behalf of AT&T Corp., ¶¶ 43-44 (CC Docket No. 96-149, Nov. 15, 2002).

[33] Selwyn Reply Dec. ¶ 35.

II. SBC'S FAILS TO JUSTIFY A WAIVER OF THE *SBC/AMERITECH MERGER ORDER*.

SBC asks the Commission to eliminate "the provisions of the *SBC/Ameritech Merger Order* that restrict the sharing of OI&M services" with respect to ASI.[34] This request is as ironic as it is unlawful. As noted, the conditions that SBC now attacks were *proposed by SBC itself* in order to remedy the severe anticompetitive effects of its merger with Ameritech.[35] Because the SBC/Ameritech merger increased the likelihood that the combined entity would discriminate against rivals in "advanced services" and other markets,[36] SBC proposed the creation of a "separate" advanced services affiliate patterned on the requirements of section 272.[37] SBC maintained that creating a separate advanced services affiliate that would have to deal at arm's length with SBC's incumbent LECs in the same manner as competitive carriers would "spur competition in the advanced services market" and "insure the maintenance of a level playing field."[38]

The conditions governing the sharing of OI&M between SBC's incumbent LECs and its advances services affiliate undeniably were (and are) central to the effectiveness of this separate advanced services affiliate scheme. As SBC explained, the OI&M-related conditions that it proposed require it "to provide the same quality service to [CLECs] as it does the affiliate, and a CLEC can readily compare its service with that of the separate affiliate to make sure it is being

[34] SBC Pet. at 2.

[35] *SBC/Ameritech Merger Order* ¶ 45.

[36] *Id.* ¶ 196

[37] *Id.* ¶¶ 363-370.

[38] Joint Reply of SBC Communications and Ameritech Corp., to Comments Regarding Merger Conditions, at 73-74 (CC Docket No. 98-141, July 26, 1999).

treated fairly."[39] SBC also agreed with commenters that the conditions that it initially proposed should be strengthened to provide even greater transparency with respect to transactions between SBC's incumbent LECs and its advanced services affiliate.[40]

The Commission codified SBC's proposed conditions in its order approving the SBC/Ameritech merger. In so doing, the Commission found that requiring SBC's incumbent LECs to provide network services, including OI&M services, to the separate advanced services affiliate only on an arm's-length and nondiscriminatory basis would maintain the "level competitive playing field" that would otherwise be irreversibly tipped by the merger.[41] The Commission furthered recognized the critical importance of the OI&M protections when it required SBC to "to provide unaffiliated carriers with the same OI&M services that its retail operations use, as well as those OI&M services that were previously made available " even *after* the general separate advanced services affiliate conditions sunset.[42]

By forcing SBC to treat its advanced services affiliate "like a CLEC," the merger conditions both reduced the ability of SBC to give ASI preferential access to bottleneck local facilities and increased the ability of the Commission, state agencies, and competitive carriers to monitor and detect such market power abuses. Not a thing has changed that could reduce the need for these important protections. Competitive carriers in SBC's incumbent territories still have no alternative but SBC for the local loops and collocation necessary to provide data

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[39] *Id.* at 78.

[40] SBC *Ex Parte* Letter at 4 (CC Docket No. 98-141, Aug. 27, 1999) (revised conditions will ensure that "CLECs gain the benefit of having transactions between the incumbent LEC and the separate affiliate be open and available for review").

[41] *SBC/Ameritech Merger Order* ¶ 363.

[42] *Id.* ¶ 368.

services such as DSL (and hence the voice/DSL bundles that many customers now demand). If anything, the need for regulation in this area is stronger in light of the collapse of the "data" LEC industry and the almost total loss of intramodal data competition.

And just months ago SBC (and the Commission) *expressly relied* upon the continued existence of the OI&M merger conditions as the basis for forbearing from applying dominant carrier regulation to ASI. In the *ASI Forbearance Order*, the Commission held that it would decline to impose dominant carrier regulation on ASI's services "*to the extent* that SBC operates in accordance with the separate affiliate structure established in th[e] [*SBC/Ameritech Merger Order*]."[43] By definition, if the Commission were to waive any aspect of the advanced services separate affiliate requirements imposed in the *SBC/Ameritech Merger Order*, SBC would no longer be operating "in accordance with the separate affiliate structure *established in that Order*,"[44] and ASI would no longer qualify for the non-dominant status that was conferred upon it the *ASI Forbearance Order*. Thus, SBC is plainly wrong in arguing that the *ASI Forbearance Order* has no bearing on the relief SBC requests here.[45]

Indeed, the Commission expressly rejected SBC's "forbearance request to the extent that it argues that lesser safeguards would suffice in the event it were to change its affiliate structure." *Id.* ¶ 30. That is because the evidence SBC proffered to show the lack of need for dominant carrier tariff protections was performance data generated over a time period in which SBC/ASI

[43] *ASI Forbearance Order* ¶ 13 (emphasis added); *see also id.* ¶ 28 ("given the separate affiliate structure established in the *SBC/Ameritech Merger Order* and SBC's commitments in this record, subjecting the rates, terms, and conditions under which ASI provides advanced services to our dominant carrier tariffing process is more likely to impede, than promote, competition.").

[44] *Id.* ¶ 13 (emphasis added).

[45] SBC Pet. at 27.

was governed by the OI&M conditions of the *SBC/Ameritech Merger Order*.[46] Further, the Commission expressly relied on the existence of the *SBC/Ameritech Merger Order*'s OI&M non-discrimination safeguards in its analysis of whether forbearance was in the public interest and whether other protections were necessary in the absence of tariff filing requirements.[47] For these reasons, if ASI were allowed to operate under "lesser safeguards" than those found sufficient to protect the public interest in the *ASI Forbearance Order*, there would be no basis for concluding that dominant carrier tariff regulations are unnecessary going forward.

But even if SBC's hypocrisy could be ignored, the limited burden imposed by the merger conditions cannot. In stark contrast to the OI&M rules the Commission adopted governing long distance affiliates, the *SBC/Ameritech Merger Order* expressly permits SBC's incumbent LEC subsidiaries to perform "operations, installation, and maintenance functions" on behalf of its "advanced services affiliate."[48] Rather than banning "shared" OI&M services, as the Commission's section 272 regulations do, the *SBC/Ameritech Merger Order* requires only that SBC provide OI&M "pursuant to a written agreement" and on a "nondiscriminatory basis."[49] Further, the Commission excused from the nondiscrimination requirement OI&M activities "performed by an incumbent LEC in the normal course of providing unbundled elements, services or interconnection."[50] There is simply no way to reconcile SBC's sweeping (and

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[46] *ASI Forbearance Order* ¶ 8 (discussing SBC's evidence that purported to show that since SBC had been abiding by the separate affiliate conditions of the *SBC/Ameritech Merger Order*, "ASI provided affiliated and unaffiliated ISPs with the same level of provisioning, installation, maintenance, and repair service").

[47] *See id.* ¶¶ 27- 29.

[48] *SBC/Ameritech Merger Order* ¶ 365.

[49] *Id.* ¶ 365 & n.678.

[50] *Id.* n.678.

unsupported) claims about the costs of duplicative personnel and delayed provisioning of advanced services with the modest – but critically important – nondiscrimination provision actually imposed by the merger conditions.

III. SBC'S "FACT" DECLARATION IS LARGELY IRRELEVANT AND, IN ALL EVENTS, ENTITLED TO NO WEIGHT.

The gaping deficiencies in SBC's arguments are not overcome by the "fact" declaration of Mr. Richard Deitz that SBC appended to its petition. Even if Mr. Dietz had demonstrated with hard evidence that the section 272 OI&M safeguards are "costly," that is irrelevant to the central legal standards for forbearance,[51] which require an assessment whether enforcement of the OI&M rules is necessary to prevent "unjust[] or unreasonably discriminatory" practices by SBC,[52] and whether these regulations are necessary "for the protection of consumers."[53] Likewise, with respect to the OI&M regulations imposed in the *SBC/Ameritech Merger Order*, Mr. Dietz is unable to provide any evidence as to how SBC's requested waiver "affirmatively and identifiably promotes the underlying purpose of the condition" – *i.e.*, how a waiver would "ensure that *competing providers* of advanced services receive effective, nondiscriminatory access to the facilities and services of the merged firm's incumbent LECs that are necessary to provide advanced services" and that are intended to "lower[] the costs and risks of entry."[54] Nor could he, as SBC is proposing to eliminate wholesale regulations that protect competition (and thus consumers) without replacing them with any comparable protections.

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[51] This, of course, assumes that the Commission even has legal authority to forbear from applying section 272, as incorporated into section 271(d)(3)(B). As explained above, it does not.

[52] 47 U.S.C. § 160(a)(1).

[53] *Id.* § 160(a)(2).

[54] *Bell Atlantic/GTE Advances Services Waiver Order*, 16 FCC. Rcd. 16915, ¶ 7 (CCB 2001) (discussing cognate merger provisions imposed on Bell Atlantic and GTE).

In all events, Mr. Dietz's declaration cannot be taken seriously. Mr. Dietz fails to come to grips with the fact that the *SBC/Ameritech Merger Order* does not ban the sharing of OI&M between SBC's incumbent LEC operations and ASI. All of Mr. Dietz's concrete "examples" of the ways in which OI&M rules have caused undue "delay[s]" pertain to ASI, which, as explained above, is *already permitted* to share services with SBC's incumbent LEC operations (pursuant to non-discrimination rules that SBC itself proposed).[55] Contrary to Mr. Dietz's suggestions, SBC can establish a central customer contact for ASI customers, SBC incumbent LEC personnel can connect and test the network components required to provide a customer's basic and advanced services, and SBC incumbent LEC personnel can repair troubles reported by ASI customers.[56] All that is required is that SBC make these same services available to other competitive carriers on non-discriminatory terms and conditions. To the extent that the costs Mr. Dietz is documenting are the result of an affirmative decision by SBC to avoid the nondiscrimination provisions of the merger conditions by not allowing the incumbent LEC personnel to perform OI&M services on behalf of ASI, that, of course, is no basis for eliminating the merger conditions.

Of course, the strongest evidence that the merger condition OI&M rules do not impose the onerous costs claimed by SBC is the fact that SBC has the ability to eliminate these costs entirely tomorrow. SBC is under *no* affirmative obligation to maintain a separate advanced services affiliate; that obligation was subject to sunset triggers that have now been met.[57] Thus, SBC is free *at any time* fully to reintegrate its advanced services operations with its incumbent

[55] *See* SBC Pet., Dietz Dec. ¶¶ 6-9.

[56] *SBC/Ameritech Merger Order*, Merger Condition I.3.c, I.3.f-l.

[57] *Id.*, Merger Condition I.12.

LEC operations. That it has not done so belies its claims that these rules impose over $77 million of unnecessary costs each year. To be sure, as explained above, if SBC were to integrate ASI into its incumbent LEC operations, SBC's advanced services would then be subject to dominant carrier tariffing and related requirements. But that is a necessary consequence of the fact that SBC would be dominant and have the ability to abuse that dominance in the absence of existing safeguards.

With respect to the application of the section 272 OI&M rules to SBCLD, Mr. Dietz provides nothing of substance. For example, Mr. Dietz complains that SBC recently lost a bid for large customer because its costs were higher than its competitors.[58] But Mr. Dietz stops short of claiming that all, or even the majority, of SBC's higher costs were the result of the OI&M rules.[59] All Mr. Dietz can claim is that absent those rules SBC's overall costs of providing service would be "lower" by some undefined amount and that this "might" have enabled SBC to win the bid.[60]

More broadly, whatever the costs and inefficiencies the OI&M requirement imposes on BOCs and their section 272 affiliates, they are *no different* than the costs and inefficiencies faced by the BOCs' competitors, and they are outweighed by the potential anticompetitive effects that would result if the OI&M requirements were eliminated prematurely. Competitors, which remain dependent on the BOC's network, also cannot respond as a single team to provide end-to-end service. Any added burdens of the OI&M requirement, therefore, do not and cannot place

[58] SBC Pet., Dietz Dec. ¶ 10.

[59] *Id.*

[60] *Id. Cf. AT&T Corp. v. Business Telecom, Inc.* 16 FCC Rcd. 12312, ¶ 49 (2001) (an expert which testifies merely that a company's costs "may" be higher does not establish "any record basis" allowing the Commission to conclude that the costs are in fact higher "at all.").

BOCs and their section 272 affiliates at any competitive disadvantage vis-à-vis their competitors; instead, as the Commission found in the *SBC/Ameritech Order*, it places them on equal footing.

In fact, contrary to SBC's claims that the OI&M restriction hobbles its operations, in the few short years since it has been granted long distance authority in its Southwestern territories, SBC has gained customers at an unprecedented rate. According to SBC's Chief Executive Officer, SBC has achieved "near 50 percent" penetration of the consumer long distance market in states other than California where it has offered long distance service prior to April 2003.[61] As to California, Mr. Whitacre claimed that SBC has achieved "a retail penetration rate of 13 percent on the consumer side, 10 percent overall" in "less than four months" since SBC commenced long distance service.[62] SBC never explains how it is economically possible for its market share to be increasing at unprecedented levels – in a market it characterizes as "highly competitive" – if its costs are in fact substantially inflated by the OI&M restriction.

Finally, while Mr. Dietz claims to have commissioned an internal study to quantify the "costs" of the OI&M rules, Mr. Dietz provides no basis whatsoever for testing the veracity of his numbers. Mr. Dietz provides no explanation of the methodology that his subordinates used. Mr. Dietz provides no clue whether he studied any potential offsetting costs of "re-integration." Mr. Dietz provides no analysis whether the OI&M costs that he identified could be lowered by more efficient practices by SBC. Mr. Dietz provides none of the workpapers generated by the employees that supposedly undertook the study. And other than the barest summaries, Mr. Dietz provides no explanation for each category as to how the changes would, in fact, lower costs. In

[61] *See* Statement of Edward Whitacre, CEO, SBC Communications, Transcript, April 24, 2003 Conference Call Addressing First Quarter 2003 Earnings.

[62] *Id*.

short, Mr. Dietz provides only *ipse dixit*, which falls well short of SBC's affirmative obligation to prove its entitlement to forbearance under section 10 or a waiver of the *SBC/Ameritech Merger Order*.[63]

CONCLUSION

For the reasons stated above, SBC's petition should be denied.

Respectfully submitted,

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July 1, 2003

[63] For these reasons, the Commission should order SBC to produce the workpapers and other documentation underlying Mr. Dietz's "study." Until the record contains such evidence that would permit the Commission and commenters to verify Mr. Ditez's claims, his testimony about the costs of the OI&M prohibition is entitled to no weight.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2003, I caused true and correct copies of the foregoing Comments of AT&T Corp. to be served on all parties by the noted methods to their addresses listed on the attached service list.

Dated: July 1st, 2003
Washington, D.C.

/s/Patricia A. Bunyasi
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